V.R.D. Decorating, Inc. *and* International Brotherhood of Painters and Allied Trades and its Local 150. Case 3–CA–18741

November 21, 1996

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND FOX

On January 30, 1996, Administrative Law Judge Robert T. Snyder issued the attached decision. The Respondent filed exceptions and supporting arguments, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions[1] and to adopt the recommended Order as modified and set forth in full below.[2]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, V.R.D. Decorating, Inc., Rochester, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to consider for employment and refusing to hire job applicants because of their membership in or concerted activities on behalf of International Brotherhood of Painters and Allied Trades, Local Union No. 150 or any other labor organization or because they indicate on their employment applications or inform the Respondent that they are voluntary union organizers, in order to discourage employees from engaging in such activities, or in any other manner discriminating with respect to their hire or tenure of employment or any terms or condition of employment.

(b) In any like or related manner interfering with, restraining, or coercing its employees or applicants for employment in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer the applicants for employment Christopher Gorman, Edward Mullaney, and Kevin Rice employment in positions for which they applied or, if such positions no longer exist, to substantially equivalent positions.

(b) Make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of this Order, remove from its files any and all references to the unlawful refusal to consider for employment and to employ Christopher Gorman, Edward Mullaney, and Kevin Rice, and within 3 days thereafter notify them in writing that this has been done and that this action will not be used against them in any way.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the terms of this Order.

(e) Within 14 days after service by the Region, post at its office and place of business in Rochester, New York, copies of the attached notice marked "Appendix."[3] Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 28, 1994.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings. Also, the Respondent asserts that the judge's findings are the result of bias. After a careful examination of the entire record, we are satisfied that the assertion is without merit.

[2] See *Indian Hills Care Center*, 321 NLRB 144 (1996).

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to consider for employment and refuse to hire job applicants because of their membership in or concerted activities on behalf of the International Brotherhood of Painters and Allied Trades, Local Union No. 150 or any other labor organization or because they indicate on their employment applications or inform us that they are voluntary union organizers, in order to discourage employees from engaging in such activities or in any other manner discriminating with respect to their hire or tenure of employment or any term or condition of employment.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of this Order, offer the applicants for employment Christopher Gorman, Edward Mullaney, and Kevin Rice employment in positions for which they applied or, if such positions no longer exist, to substantially equivalent positions.

WE WILL make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them.

WE WILL, within 14 days from the date of this Order, remove from our files any and all references to the unlawful refusal to consider for employment and to employ Christopher Gorman, Edward Mullaney, and Kevin Rice, and within 3 days thereafter notify them in writing that this has been done and that this action will not be used against them in any way.

V.R.D. DECORATING, INC.

Ron Scott, Esq., for the General Counsel.
Vincent D. Raimo, Esq. (DiRaimo and D'Agostino, Esqs.), for the Respondent.
Christopher Gorman, Business Representative, for the Charging Party.

DECISION

STATEMENT OF THE CASE

ROBERT T. SNYDER, Administrative Law Judge. This case was heard by me on June 5, 1995, in Rochester, New York. The complaint alleges that V.R.D. Decorating, Inc. (V.R.D. or Respondent), discriminatory refused to hire three employee applicants, Christopher Gorman, Edward Mullaney, and Kevin Rice, because of their membership and activities on behalf of the International Brotherhood of Painters and Allied Trades, Local Union No. 150 (IBPAT and Local 150), respectively, in violation of Section 8(a)(1) and (3) of the Act. Respondent, by written answer, denied the commission of any unfair labor practices. Respondent also asserted certain affirmative defenses which will be dealt with, infra.

All parties were provided full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. The General Counsel and Respondent each filed posthearing briefs which have been carefully considered. On the entire record in this case, including my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION STATUS

At all material times, Respondent, a corporation, with an office and place of business in Rochester, New York (Respondent's facility), has been engaged in the construction industry as a painting and wallcovering contractor. During the 12 months' period preceding the issuance of the complaint in this matter Respondent, in conducting its business operations described above, provided services valued in excess of $50,000 for the University of Rochester located in Rochester, New York, which is directly engaged in interstate commerce. As a consequence of the foregoing facts, I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Respondent admits and I also find that the Charging Union Local 150 is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *The Alleged Refusal to Employ the Three Applicants*

Counsel for the General Counsel called as a witness, Norma Bauer, who testified she was secretary-receptionist for the ROW Corporation. It provides administrative services for its employer clients which probably exceed 100 in number, preparing their payrolls, among other functions, as well as accepting and transmitting to them applications for employment. In this connection, it also provides telephone answering services for the clients as well. It has offices located in a business building at 2300 Buffalo Road, Rochester, where V.R.D., one of its clients, also has its own offices.

Her normal duties regarding applications for employment was to provide walk-in applicants with blank applications

and place them in the particular client's mail slot for pick up by the client. On Friday, June 24, 1994, V.R.D. placed an advertisement seeking painters which appeared in the Rochester Democrat and Chronicle, a local newspaper.

It read as follows:

> PAINTERS: must have experience in commercial/industrial painting. Great wages. Benefits offered. Own Transportation. Apply ROW Corp. 2300 Buffalo Road, Building 300.

Bauer had been made aware by her supervisor that such an ad would appear.

On Tuesday, June 28, 1994, a group of men appeared at the ROW Corp. Office seeking employment. Bauer recalled six men. She gave each of them a V.R.D. employment application, they filled them out, brought them back to her, thanked her, and left. Initially, Bauer could not recall any conversation she had with any of them, anything they were wearing, or anything they wrote on their applications. She placed the six completed applications in V.R.D's mail slot. However, during her cross-examination she now disclosed that one of the six applicants acted as a spokesman for the rest of them. On her redirect examination Bauer denied having any conversation with Vincent DiRaimo Jr., V.R.D.'s president, after the men had gone. Neither could she recall ever telling him that some people had come in to try to start a union. Now, on recross-examination, Bayer disclosed for the first time, after previously denying any such conversations, that she had been surprised at seeing six people come in and apply for one job and asked one of them why they were there, and he had replied they were there to start a union. When asked if this disclosure had been passed on to DiRaimo, Bauer now continued to deny any recollection of having done so, adding "why would I?" (Tr. 31.) Bauer acknowledged she didn't know how many jobs were available, and that the ad sought painters, not a single painter. DiRaimo himself later admitted that Bauer told him that some people had come in and tried to start a union.

Christopher Gorman testified that he is the business representative for Painters Local 150. He is an experienced painter and paperhanger, having been employed as a foreman by a local painting contractor, A. R. Perrepont Company, for 12 years, and having run a lot of their jobs. He was elected to his present union positions 2 years ago.

The International Union has a program, known by its initials a COMET, standing for Construction Organizing Membership Education and Training, which has as one of its goal organizing nonunion contractors in the painting trade. In furtherance of that goal Gorman has trained Local 150 members as voluntary organizers and the International Union has authorized its local members to become employed by nonunion firms in furtherance of its goal of having them become unionized and enter into collective-bargaining relationship's with the Union.

When Gorman saw the June 24 ad which appeared in the Rochester newspaper he contacted a number of Local 150 out-of-work members and invited them to join him in applying for jobs in furtherance of the Union COMET program. Five members came to the union hall on the morning of June 28 where Gorman gave them Local 150 T-shirts and hats and told them to be respectful, truthful on their applications, and let him do the talking. They first visited another painting firm, Upstate Painting, to apply for work and then arrived at the ROW office at about 10:30 a.m. The office door had both ROW's and V.R.D's names on it. The members who accompanied Gorman were Edward Mullaney, Kevin Rice, Dave Bianchi, Dale Clegg, and Dave Grieco.

Gorman and the others approached Bauer. Gorman said they were from the Union, they'd like to apply for jobs, and Bauer gave them V.D.R. applications. Gorman specifically asked if their status as volunteer organizers would affect their chances for employment and Bauer said, no, it would not. After completing the applications, Gorman asked who actually does the hiring. Bauer said that Vinnie did the hiring and the interviewing. Gorman asked if he would get their applications and she said, yes. When he asked if they would be called to an interview, she said, she didn't know, it depends on what Vinnie does. All the six applicants, pursuant to Gorman's instructions in filling out their applications, has written "trained unon organizer" in bold print, roughly 3/4-inch high, across the top of the form.

A week later, Gorman telephoned the member for ROW corporation. He assumed that Bauer answered the phone. He identified himself and asked if his application had been reviewed. She said, all I can tell you is that Vinnie has the applications. He was not contacted by ROE or V.R.D. To Gorman's knowledge, none of the other five-union members who applied were contacted by either POW or V.R.D.

Gorman described the work experience of Kevin Rice, one of the six union applicants, who was not able to attend the hearing because he had been called back to work out of town as a painter. Gorman has known Rice as a painter in the trade for 6 years. Gorman worked with Rice extensively prior to his being elected business representative. For 9 months they worked together at the Xerox Company in Webster, New York. Rice spray painted off a lift, and performed brush and roll painting for a variety of industrial companies and in nuclear power plants. According to Gorman, Rice is a very competent painter and worked steady until his jobs ended.

In completing their job applications, Gorman listed his own extensive experience, including his 12 years with the Perrepont Company, and helped the other five applicants, including Rice, in listing the dates, companies, and locations of their work histories.

During his cross-examination, Gorman explained that while as business representative for Local 150 he customarily put in a full workday starting at 7:30 a.m. and running, at times, to 7:30 p.m., since Local 150 employs a business manager, Glen Chaffey, who is in charge as the principal officer of the Union, that manager could handle Gorman's duties while Gorman was employed by V.R.D. or another painting contractor. Gorman's normal duties include policing the Union's contracts, checking jobs to determine if nonunion employers are paying the prevailing rate, and talking a lot to nonunion men.

Gorman confirmed that none of the other applicants were employed at the time they made their applications, although Rice, who was then unaware of any prospect of recall was very shortly thereafter called back to work by the Pierrepont Company. Each of them had previously called the union hall and been placed on its out-of-work list. Records produced by the Union for V.R.D. confirm this. When the men were ap-

proached by Gorman about applying for work at V.R.D., they were told that if they were accepted they were to work for the length of employment, otherwise don't apply.

Gorman also confirmed it was against the Union's rules to work nonunion unless the employment was part of the COMET program.

Gorman believed he and the others had been discriminated against by V.R.D. because of their union organizer status. They were never interviewed or called by Respondent, although Respondent had advertised for help and they had made a good-faith effort in applying for jobs and they had extensive experience. Of the six members who had applied, two, Clegg and Grieco, did not want to go through with this type of procedure, did not want to cooperate, and a third, Bianchi, left the Union. Thus, the original charge filed on July 28, which alleged V.R.D.'s refusal to hire various employees of IBPAT, Local Union No. 150, was later amended on November 16, to allege the refusal to hire three job applicants, Gorman, Mullaney, and Rice of the Union, thereby eliminating the three, Clegg, Grieco, and Bianchi, from consideration for inclusion in the complaint, which issued on November 30.

Under vigorous cross-examination, Gorman emphatically denied that the real reason he and the others went to V.R.D. was not to look for work, but to organize and thereby provide practical experience to members who took the union training course. In Gorman's words: "No. No. You have to get hired before you can do effective organizing, to show the employees there that they have rights under the NLRA and a lot of them are afraid." (Tr. 117.)

Finally, on redirect examination, Gorman testified that on June 28, when he asked Bauer whether anybody had been hired already, she said that we hired three or four. Gorman then asked, "[D]o you intend on hiring any more?" Bauer replied, "oh yes" and then proceeded to name some jobs that V.R.D. had to do. He recalled that she named three, different projects, and noted that was why they were advertising for help. Gorman could recall only one job at the time he provided a pretrial affidavit to the Board, but was not referred to it to refresh his current recollection.

Edward Mullaney testified that he was a painter since 1968, with experience in residential, commercial, and industrial work. He performs airless spraying and does dry wall finishing. Mullaney took the COMET course and responded to Gorman's request for trained members to seek work with V.R.D., among other noncontractors. Mullaney put on a union T-shirt given to him by Gorman at the Union's hall. The others who gathered there that day, June 28, also wore the union T-shirt. The shirt is white and has a round blue logo about the size of a softball on the front. The logo has blue lettering with "Local 150," around the top and "Rochester, New York," around the bottom. Thus, the local union affiliation of the applicants was made clear when they appeared at the ROW corporation offices and Gorman announced their union status as volunteer organizers for the Union and the applicants wrote their status across the top of their applications.

At ROW Gorman told Bauer they were there to file applications for the job advertised in the Democrat Chronicle. Mullaney wrote "trained union organizer" on it and attached a resume to his application. Beside listing personal data, and education, it listed under affiliations, his membership in Local No. 150 I.B of P.A.T. and included the variety and extent of his painting experience going back to 1968 and other industrial experience earlier. Most recently, he listed work for Patrick M. Bianchi with an address in Rochester from July 1990 to July 1992 and with various union contractors from July 1992 to the present performing commercial, industrial painting, airless spraying, and dry wall finishing. Mullaney has not done paper hanging work.

Mullaney received no contact from V.R.D. at any time. A day or two after June 28 he called ROW, identified himself, and said he was following up on his application. The receptionist told him she had given his application to Vinney. Mullaney also asked if Vinney was in. When he learned he was not, Mullaney asked for the best time to call him and was informed it was usually first thing in the morning. Mullaney called early the next day, again identified himself, and was told Vinney wasn't in and the ROW receptionist didn't know when he would be.

On cross-examination, Mullaney positively identified the voice on the telephone when he called as belonging to Bauer, the women who took his application. At the time of his June 28 application, Mullaney was out of work about a month. When out of work Mullaney goes to the union hall every Monday to report his status and seek a possible referral.

A few months after the first ROW corporation ad appeared, Mullaney saw another one seeking painters. He called the telephone number listed at the time specified but received no answer. He called the other number, and someone took his name and telephone number and said they would get back to him. No one did. At this point, Mullaney filed another unfair labor practice charge against V.R.D. which was subsequently withdrawn. Mullaney or the union also filed another charge against Upstate Painting, another nonunion contractor to which he applied under the COMET program. This charge resulted in a settlement agreement under which Mullaney received a make-whole remedy and an offer of employment which he accepted in May 1995.

Mullaney also contacted Joe DeJohn, an ex Local 150 member who was employed as an estimator by V.R.D., between June and December 1994, about obtaining painting work with V.R.D. This effort was not successful as De John merely asked if Mullaney had applied for work directly and whether he was still a member of the Union, to both of which Mullaney answered, yes.

Counsel for the General Counsel introduced into evidence, pursuant to stipulation a history of V.R.D. hires and employees from the pay period ending June 26, 1994, to March 1995. For the pay period ending June 26, 1994, V.R.D. employed five painters, three paperhangers, and one estimator. One of the five painters, Rafael Torres had been hired on June 23, but was terminated on June 26.

In the period between June 27, 1994, and April 2, 1995, V.R.D. hired 13 painters and 7 paperhangers. A number of them were terminated and then rehired during this period, including one who was hired and terminated the same day. One individual, Kurtis Day was hired as a painter on June 27 and then terminated a few months later, on August 28. Three others, Dennis Howard, Edward Locurcio, and Gerald Locurcio were all hired on June 28, the date the three alleged discriminates applied for employment, and two of them, Gerald Locurcio and Dennis Howard, were terminated in early July. Another spate of hiring of both painters and paper-

hangers took place at the end of September through October 1994. Two painters hired during this period, Richard Bozza hired September 28, and Todd Dodson, hired October 30, were each terminated 5 to 10 days later. When terminations were made, hiring sometimes followed within a day or a few days thereafter, but more often than not they did not. Four terminations of painters took place over the period July 3 to September 16, 1994, without any of them being replaced until the hiring picked up at the end of September. At least three successful applicants for jobs, two as painters and one as paperhanger, listed no experience and a number of others listed minimal experience in 1994 or failed to date or specify their work history.

Vincent DiRaimo, Respondents' president, was called and examined as a witness by counsel for the General Counsel. Respondent did ultimately produce employment applications of employees hired. As to the applications submitted by Gorman, Mullaney, and Rice, also sought by subpoena, DiRaimo testified that the file in which they would have been contained, a miscellaneous job applications file, had been misplaced. It had been misplaced "quite some time ago, like probably right about when it was received." (Tr. 33.) The job applications of hired applicants were produced from the personnel files of employees maintained for V.R.D. by ROW. DiRaimo discovered that the applicant's file was lost by the time he met with a Board agent on the investigation of the instant charge in late September 1994. Thus, it was presumably "lost" sometime between June and September.

DiRaimo didn't recall whether he would have seen all the applications filed with ROW Corporation in late June 1994. Typically, he is the one who picks them up from the mail slot at ROW's office where they are left for him. DiRaimo confirmed that Norma Bauer is the only clerical employee who reviews the applications and he is the only V.R.D. person who reviews them.

DiRaimo had authorized ROW to place the ad in the local newspaper which ran in June 1994, the dates of which he could not recall. DiRaimo acknowledged that two employees, Dennis Howard and Rafael Torres, were hired as a direct result of the ad. Since Torres was hired on June 23, the ad very likely started running before the date on which Gorman first ran it, on June 24. Torres was terminated on June 26. Howard, hired June 28, was terminated on July 7. Three others hired at that time, Kurtis Day on June 27, and Edward and Gerald Locurcio on June 28, had been previous employees who happened to contact DiRaimo, at this time, looking for jobs.

Although the applicants hired at the end of June totaled five, DiRaimo was unwilling to agree that this showed a need to fill five positions. The employees with prior experience were taken back because DiRaimo was unsure of the suitability of the two he hired then, Howard and Torres, who were unknown to him. These latter two were not as qualified as they claimed and both were shortly terminated.

Kurtis Day left employment voluntarily on August 28 when he moved to Colorado. Gerald LoCurcio actually worked only 1 day, June 28, and then quit to perform other work. He was later rehired in October and terminated in January 1995 along with his brother Edward and two other painters. Neither Day, Howard, nor LoCurcio was replaced after they were terminated. According to DiRaimo there was no immediate need for workmen and the unknown applicants were hired mainly to see if they were trainable and useful. DiRaimo exclaimed it was just as easy to pay current employees overtime wages then to hire additional workers who don't work out.

When pressed further, about the placement of the ad in June, DiRaimo said V.R.D. was just "fishing," to see who was available for future reference. He explained, we weren't in dire straits for help. We were fishing to see who was out there and who we could train.

During a further examination conducted of DiRaimo by the counsel for the General Counsel after Respondent had produced the employment applications of those employees it hired, the dates on certain of these applications show that at least two of them, the applications of Edward Guzman, dated July 20, 1993, but hired October 17, 1994, and the application of Robert Williams, dated August 27 with the year unknown, but hired on November 23, 1994, show that, contrary to his testimony, DiRaimo did retain employment applications of applicants not immediately hired. DiRaimo was not asked and had no explanation as to why these particular applications were not "misplaced" in the months before their actual hire while those of three alleged discriminators and all others not hired were "lost."

DiRaimo also acknowledged that applicant Dennis Howard, hired on June 28, did not have extensive painting experience on his application, which Respondent failed to produce. He was a "lower level" painting mechanic (Tr. 169), but told DiRaimo that he had quite a bit of experience. Howard was terminated on July 7, after only working less than 2 weeks, when he either quit or was fired, DiRaimo wasn't sure which.

During Respondent's own examination of DiRaimo, an attempt was made to show the particular circumstances which led to the hiring of the various applicants in the June 1, 1994, to March 1995 period. A number of the employees hired had previously worked for V.R.D. These included Gerald and Edward LoCurcio, Edwardo Guzman, Robert Williams, and Kurtis Day. Another, Richard Bozza claimed to have special finishing and marbleizing skills and was recommended by a friend. Yet, his application does not list such specialized experience, although it does show he received an interior decorator's license. Those skills didn't measure up and Bozza was terminated within 2 weeks of hire on October 11. A number of the new employees hired, at least five, had never worked for V.R.D. before but were primarily assigned preparation work, priming, filling holes, sanding, rather than finish painting. A few others, also new to DiRaimo, were hired as paperhangers.

DiRaimo also described an approach made to him by Dave Bianchi's wife which illustrates the difference in treatment he accorded non or disaffected union applicants in contrast to his reaction to applicants who were union advocates and organizers. Sometime before Bianchi came in with the five others to file their applications on June 28, probably a month earlier, in May, DiRaimo received a telephone call from Bianchi's wife. She told him her husband was looking to seek employment, he's been a member of Local 150 for quite some time and he's looking to get a job where he can stay more steadily employed than the union has had to offer him in the recent past. It is evident that this approach was outside the Union's COMET program and was rather an ef-

fort to obtain nonunion employment by a member who, although an initial participant in the later union approach to V.R.D., later did quit the Union, and that DiRaimo understood it as such. Mrs. Bianchi also spoke about her husband's knowledge of Joe DeJohn, the ex-union member, than working for V.R.D. as an estimator. In contrast to DiRaimo's ignoring of, and nonresponse to, the six union member applicants and the followup efforts of two of them, Representative Gorman and member Mullaney, to contact him directly and seek interviews, DiRaimo now admittedly told Mrs. Bianchi to have her husband contact him and come in to see him, for he would be happy to sit down and talk to him. Bianchi mailed DiRaimo a resume but did not call for an interview. Although DiRaimo had Bianchi's application in hand following his June 28 visit to ROW Corporation and then was aware of Bianchi's continuing interest in employment, he made no effort to arrange an interview for Bianchi. Of course, this latter application was made in furtherance of the Union's organizing effort.

There is also evidence that one of the six union applicants, Dale Clegg, had previously helped start V.R.D. as a company before he joined the Union and that DiRaimo was familiar with Clegg. Yet, once Clegg filed his application as a union organizer on June 28, 1994, DiRaimo made no effort to reemploy Clegg as he had other prior V.R.D. employees who had subsequently left, such as the Locurcio brothers and others. The main difference between them was that Clegg was now a union member and frank about his organizing objective and the others had no union ties.

DiRaimo also attempted to dismiss Bauer's comment to him, by phone, that some people had come in today and said that they were here to start a union as an "in-passing comment," made almost in jest.

When asked directly, DiRaimo admitted that he never gave specific consideration to the applications of Gorman, Rice, and Mullaney. By the time these gentlemen came in (with three others at the time), there were no immediate openings, and he therefore would not have given their applications high priority. But DiRaimo also testified that he could not recall seeing the applications with Gorman's, Mullaney's, or Rice's name on them. And, although V.R.D. hired another group of employees starting the end of September 1994, he did not consider the applications of these men or contacting Local 150 to have them resubmitted at that time, DiRaimo could not recall how he learned about some of the applicants he hired in October and how they happened to file applications with V.R.D. They did not apply in response to any newspaper ad.

DiRaimo also denied ever receiving any message that Gorman or Mullaney had telephoned him. He later changed this to testify that he did not recall receiving any message that these applicants had called him. Telephone messages are left for him in a message bin and they may sit for 5 or 6 days before he has a chance to pick them up and review them.

B. *Credibility Resolutions*

I credit the testimony of both Gorman and Mullaney. They testified in a straightforward manner, and were responsive and consistent during cross-examination.

It is also clear to me that Norma Bauer was less than forthcoming in her testimony. During her direct examination by the General Counsel, she withheld her knowledge of Gorman's acting as spokesman for the six union member applicants and telling her they were there to start a union. Although she expressed surprise at seeing six applicants appear together for one job she later could not recall how many jobs were available. I find that Bauer's surpRice and the full extent of her conversation with Gorman she communicated later the same day to DiRaimo. Bauer clearly had reason to pass this information on to DiRaimo in the fulfillment of her duties to review applications. Her failure to recollect having done so, accompanied by her own question "why would I?" is rejected as weak and not credible. As a consequence of her conversation with him, DiRaimo now learned on June 28 that six Local 150 members, each holding himself out as a trained union organizer, had applied for employment in response to his ad. I reject DiRaimo's prevarication that Bauer gave him this information in passing and almost in jest. It was a very serious matter to him and the hiring of any of these applicants would place in jeopardy his union free operation.

I also find that, contrary to his initial denial, later followed by a lack of recollection, DiRaimo received the followup telephone messages that Gorman and Mullaney both left for him. Whether or not DiRaimo delayed in picking up his phone messages, he shortly became aware that these two applicants, at least, were serious, and wanted to arrange early interviews leading to their employment.

I further do not credit DiRaimo that in placing the ad he was merely fishing to find out the kind of applicants available and that he did not have current work available for new employees. Bauer informed Gorman that V.R.D. intended on doing additional hiring and, in fact, gave him the names of three pending work projects and explained the ad was placed to solicit workers for them. While DiRaimo said in placing the ad he was looking to see who could be trained among new applicants, the lost time and money spent in training was unnecessary with respect to Gorman, Mullaney, and Rice who each had extensive experience in the areas listed in the ad, commercial, and industrial painting, and could produce positive results for V.R.D's business right away.

While DiRaimo did not immediately replace Gerald Locurcio, Howard, or Day, he suggested that there was sufficient work to provide overtime opportunities to his existing work crew. Aside from Bauer's statements about V.R.D's worker needs, it would be unreasonable not to take the ad's solicitation for experienced painters seriously, particularly since V.R.D. hired three new painters, Torres, Day, and Howard, in the space of 4 working days, between June 23 and 28. DiRaimo has not suggested that the openings for which these three were employed ceased to exist, only that "we weren't in dire straits for help." I draw the inference that Respondent delayed replacing these three in July or August in order to avoid interviewing or making job offers to any of the six union applicants, in particular the two whose followup efforts to contact him he ignored. Certainly, jobs were available starting in late August when a series of hires were made, substantially all of whom were unknown to DiRaimo. By this time, DiRaimo may have believed that without any older applications on file because they had been "misplaced" he was free to hire without reference to them. DiRaimo did not explain his failure to contact Mullaney whose resume later submitted a second time was on file, or

for that matter, Local 150, where he could speak to Gorman and obtain the telephone numbers or addresses of the other union applicants. In this connection, it is highly likely that DiRaimo's "misplacement" of the application file was, itself, a device to avoid having to consider any of the six applicants for job openings in September and October. The "loss" of this file is highly suspicious, and, as noted earlier, when it suited V.R.D's purposes, DiRaimo was able to produce older applications which would have been part of this file until the two applicants later hire in October and November 1994.

Analysis and Conclusions

As noted earlier, none of the six union organizer applicants were called in for an interview, or given any consideration by Respondent for a painting job in spite of the fact that V.R.D. had the same day advertised its need for experienced painters, and probably all of them, certainly the three alleged discriminates, demonstrated considerable and varied commercial and industrial experience on their applications and two of them had demonstrated a special and continuing interest in employment by followup contacts. In spite of these facts, Respondent failed to replace three painters, two of whom had dubious qualifications and proved to be unqualified, during its busiest season, instead relying on overtime work by its existing and minimal painting force. By the early fall when it started hiring again, Respondent choose a number of unknown applicants, who were only utilized in preparation work because of a minimum or absolute lack of experience or skills, ignoring totally the experienced and tested union applicants who continued to be available to it. In contrast, Respondent had also made known to one of the six applicants a month before his June 28 union supported applications, at a time when Respondents' president was aware of his interest in working nonunion and apparently in conflict with the Union's goals, that he would be happy to meet with and interview him.

Thus, Respondent avoided, at all costs, the interview and hire of known union member applicants who had announced on their applications, and in their spokesman's words, and by their clothing, an obvious intent in organizing Respondent's work force. Contrary to Respondent's claim made at page 4 of its brief, the counsel for the General Counsel did not readily admit that Norm Bauer was not an agent of Respondent, for any purpose. Certainly, the page and line reference for this asserted admission does not support the claim. Since Respondent employed the services of ROW Corporation and, Norma Bauer of that organization in particular, to receive employment applications and direct them to Respondent, she was clearly an agent for a particular purpose which Respondent cannot dispute. Since, by the ad, applicants were directed to an office also containing Respondent's name on the door, and, in providing blank applications and responding to applicant inquiries about the application and interview process and expressing V.R.D's continuing need for workers, applicants were reasonably led to believe that Bauer could speak with authority about these matters, I also conclude that Bauer was clothed by V.R.D. with the apparent authority to act for it is providing information about the preemployment process, including assuring applicants who reached her by telephone that their applications had been forwarded to and received by "Vince" (DeRaimo) and that the hiring process for existing projects was continuing. See *Albertson's, Inc.*, 307 NLRB 787, 795 (1992), and *Toyota of Berkeley*, 306 NLRB 893 (1992).

While it is true that because of their failure and refusal to cooperate, the alleged discriminatees have been limited to three of the original six applicants, I may weigh Respondent's failure and refusal to consider or hire any of them in determining whether a prima facie case of violation has been established. It has also not been necessary for Rice to testify in support of a case amply established by Gorman and Mullaney and where Rice's evident qualifications and in person applicantion was established on the record.

Based on the foregoing, I conclude that the General Counsel has established by a preponderance of the evidence that their membership in the union and their protected converted activity of informing Respondent of their interest and intent in organizing its work force, once hired, was a motivating factor in Respondents' refusal to interview, consider, or hire applicants Gorman, Mullaney, and Rice. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), as approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

Although involving larger work forces, Board decisions in such cases as *Fluor Daniel, Inc.*, 304 NLRB 970 (1991), and *Ultra Systems Western Constructors*, 310 NLRB 545 (1993), enf. denied 18 F.3d 251 (4th Cir. 1994), strongly support the violations alleged here. In *Fluor Daniel*, in particular, the Board took note of the Respondent's failure to contact any of the union applicants whose applications clearly warranted some type of inquiry or response and where the applicants offered employment displayed no union ties. Here, the Respondent offered no credible evidence to explain why none of the three applicants was considered for employment in the 9-month period following their applications while others with lesser skills and experience were routinely hired. Id. at 971; see *KRI Constructors*, 290 NLRB 802, 812 (1988). Furthermore, just as in *Fluor Daniel* at 971, each of the applicants here was bona fide, in spite of having written "voluntary union organizer" on their applications. See, also, *Sunland Contruction Co.*, 309 NLRB 1224 at 1230 (1992). In this connection, while not an issue in *Fluor Daniel*, the Supreme Court has now laid to rest the issue as to whether or not full time paid union organizers, such as Christopher Gorman, are employees within the meaning of the Act. In *NLRB v. Town & Country Electric*, 116 S.Ct. 450 (1995), the Court has now determined that a worker may be a company's employee under the Act, even if, at the same time, a union pays that worker to help the union organize the company. It should also be noted that the word "employee" under the Act includes job applicants. See *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 185–186 (1941). Thus, I conclude, based on the totalability (sic) of circumstances, that Respondent's stated motives for rejecting the applications of Gorman, Mullaney, and Rice were false and its true motive was to discriminate against them because of their union affiliation.

In its answers and its brief, Respondent asserts it had no need for painters, and that it is obvious that neither Gorman, Mullaney, nor Rice would have accepted work as "prep painters." I have previously dealt with DiRaimo's assertions regarding his not having a "drastic" need for painters (or paperhangers) on the record. Gorman and Rice were qualified to perform both jobs. I have rejected the bona fides of

Respondent's defense in this regard in my credibility resolution. Here, it need only be added that Respondent has not shown that it had no need for painters in the early fall, only that the ones it hired performed preparation work. If Respondent had given consideration to qualified and experienced painters such as the three alleged discriminatees, they would have surely provided satisfactory and full painting services. It is also not established that the three would not have accepted preparatory work. Respondent failed to ask Gorman and Mullaney this question in cross-examination, and given their obvious goal of organizing V.R.D's work force, any difference in pay would have been far less significant to them than the opportunity to perform services as employees and seek to bring about a collective-bargaining relationship between Local 150 and V.R.D. I would also find such preparatory work as DiRaimo described to be part and parcel of, or substantially equivalent to, the job. I will recommend that Respondent be required to offer them in my proposed remedy. I therefore also conclude that under *Wright Line*, supra, Respondent has failed to establish as an affirmative defense that the three applicants, Gorman, Mullaney, and Rice, would not have been hired even in the absence of their union memberships and activities.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in the commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Charging Party Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By refusing to consider for employment or to offer employment to applicants Christopher Gorman, Edward Mullaney, and Kevin Rice on and after June 28, 1994, because they were members or supporters of International Brotherhood of Painters and Allied Trades, Local Union No. 150, as demonstrated by their job applications and group appearance at V.R.D. Decorating's employment office, the Respondent has unlawfully discouraged membership in a labor organization in violation of Section 8(a)(3) and (1) of the Act.

4. The unfair labor practices, described above, affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondent, V.R.D. Decorating, Inc., has violated Section 8(a)(3) and (1) of the Act, I shall recommend that it cease and desist therefrom, and take certain affirmative actions necessary to effectuate the purpose of the Act. Having found that the Respondent unlawfully discriminated against Christopher Gorman, Edward Mullaney, and Kevin Rice, I shall recommend that it be ordered to offer them employment to the same or substantially equivalent positions for which they applied. See *Dean General Contractors*, 285 NLRB 573–574 (1987), as to the factors which the Board may consider during the compliance stage of the proceeding when applying the traditional reinstatement and make-whole remedys in the construction industry. I shall also recommend that the named discriminatees be made whole for any loss of earnings and other benefits they may have suffered by reason of the discrimination against them from the date they applied for employment to the date that the Respondent makes them a valid of employment. Backpay shall be computed on a quarterly basis, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and shall be reduced by net interim earnings, with interest computed in conformance with *New Horizons for the Retarded*, 283 NLRB 1173 (1981). Additionally, I shall recommend that the Respondent expunge its files of any reference to the failure to employ the named discriminates and inform them that this has been done.

[Recommended Order omitted from publication.]